No. 182

FILED
JUN 20 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner.

Petition for Writ of Certiorari

HARLAN L. HACKBERT,
208 South LaSalle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

CHICAGO LAW PRINTING CORPORATION, 189 W. MADISON, CHICAGO - FRANKLIN 2-8521

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

RUTH ELAINE ALLENDORF, as Special Administratrix of the Estate of James Dale Allendorf, Deceased,
Respondent,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner.

Petition for Writ of Certiorari

Your petitioner brings this petition for a writ of certiorari to review a final decision of the Supreme Court of Illinois, on rehearing, which decided two important questions in the administration of the Federal Employer's Liability Act, namely: (1) whether the Supremacy Clause of the federal constitution compels a state court to assume jurisdiction of an FELA death case which arose outside the state, despite a non-discriminatory statute of the state denying such jurisdiction, and (2) the competency and scope of actuarial testimony as to the present value of future pecuniary losses of the decedent's dependents.

OPINION BELOW

The final opinion of the Supreme Court of Illinois on rehearing is reported as *Allendorf* v. *Elgin, J. & E. Ry. Co.*, 8 Ill. 2d 164, 133 N.E. 2d 288. The opinion handed down at the May, 1955 Term, which was superseded by the opinion on rehearing under the state practice, is not reported either officially or unofficially. Both opinions, including the dissenting opinion on rehearing, are printed as an appendix to this petition.

JURISDICTION.

The first opinion was filed and a judgment of affirmance was entered on May 20, 1955. Appellant's petition for rehearing was allowed on November 21, 1955. The final opinion on rehearing was filed and the final judgment of affirmance was entered on March 22, 1956. No further rehearing was permissible under the state practice and none was sought.

This petition is filed within ninety days from the final judgment of the Supreme Court of Illinois. Jurisdiction of this Court to review the judgment is invoked under Title 28, United States Code, §§ 1257 (3) and 2101 (c).

QUESTIONS FOR REVIEW.

1. Is a state statute, not discriminatory in its terms, denying state courts of jurisdiction to hear actions for wrongful death occurring outside the state invalid under the Supremacy Clause of the federal constitution when applied to actions under the Federal Employer's Liability Act? Subsidiary to the major question are the following:

   a. Did Congress either in the Federal Employer's Liability Act or otherwise, impose on state courts the requirement that they must hear cases brought under that statute?

b. Have either Congress or this Court declared a federal policy that a state must provide a remedy in its court for federally-created rights of action?

c. Absent Congressional action or a federally-declared policy, may a state legislature determine the jurisdiction of the courts of that state in accordance with local policy, and may the state courts enforce that policy as to FELA actions, even though prevented by the Full Faith and Credit Clause from enforcing the policy as to actions based on statutes of other states?

2. Must the calculations of an actuarial witness as to the present value of future contributions to his dependents, as a matter of law, be based upon (1) gross earnings, rather than take-home pay, (2) life expectancy rather than work expectancy, (3) the deductions only of his "personal expenses" of a nominal monthly amount, and (4) assumed contributions to his children after they attain their majority?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action is brought under the Federal Employer's Liability Act, Title 45, United States Code § 51-60 which so far as pertinent here provides:

> "§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the States or Territories,

and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

The Illinois statute involved is the proviso to § 2 of the Illinois Injuries Act, Ill. Rev. Stat. ch. 70, § 2, adopted May 13, 1903 (Laws, 1903, p. 217, § 1), which so far as relevant here is as follows:

" . . . Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

The constitutional provisions involved are:

Art. VI; Cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Full Faith and Credit Clause (Art. IV, Cl. 1) which was involved in *Hughes* v. *Fetter*, 341 U.S. 609, and *First Nat'l. Bank* v. *United Airlines, Inc.*, 342 U.S. 396, is not involved here.

STATEMENT OF THE CASE.

James Allendorf, a twenty-four year old switchman, who had been employed by the defendant since May, 1951, was instantly killed at Gary, Indiana on March 3, 1952 when he was struck by a cut of cars being kicked down a lead track adjacent to the track on which his crew was working. We do not raise here the questions as negligence, violation of the regulations and statutes governing locomotive headlights or contributory negligence which were argued below; hence the details of the accident are not material. The jury found adversely to the defendant on all such issues.

Allendorf was a resident of Indiana. He left surviving him his widow and twin daughters a year old; a third child was born post-humously five months later. His widow was appointed special administratrix by the Circuit Court of Lake County, Indiana (Abst. 93, 96) and she brought this action in the Circuit Court of Cook County, Illinois. Following the verdict and judgment for the plaintiff, defendant filed a motion in arrest of judgment, raising the issue of lack of jurisdiction under the proviso to the Illinois wrongful death statute. (Abst. 17) This motion was a timely method of raising the issue under the state practice. *Walton* v. *Pryor*, 276 Ill. 563. Plaintiff asserted the unconstitutionality of the statute. (Abst. 227-233) The trial court denied the motion, holding the Illinois statute unconstitutional under the federal constitution. (Abst. 233) The Supreme Court of Illinois, on direct appeal because of the constitutional question, affirmed, saying:

> "We hold, therefore, that insofar as section 2 of the Injuries Act prevents the bringing of actions within this State to recover damages for wrongful acts resulting in death committed without the State, it is contrary to article VI of the United States constitution."

The second question presented arises upon the rulings of the trial court permitting an actuarial witness to testify that the present cash value, discounted at 2-½% and 3% of monthly contributions of $378.09 for 464 months was, respectively, $112,904.37 and $104,418.69 (Abst. 106-108) The figure of $378.09 per month was based upon Allendorf's gross earnings for 1951, the year preceding his death, less only (1) the amount of his 1951 federal income taxes and (2) $50 per month, which amount his widow testified he used "for his personal purposes." (Abst. 94) and the figure of 464 months was an assumed "work expectancy" to age 65. (Abst. 108) The witness also testified to similar calculations based on a projection of Allendorf's 1952 earnings, the figures being $115,006.64 and $106,362.89. (Abst. 109) The admissibility and competency of this evidence was challenged by motion for new trial (Abst. 21) which the trial court denied. (Abst. 233) In its first opinion the Supreme Court of Illinois sustained the competency of this evidence generally; in the final opinion on rehearing, that court held that it was error to permit the actuarial witness to use figures of wages and years of expectancy shown in the evidence, but that the error was not prejudicial because as a matter of law the right of recovery should be based on gross earnings (without regard to federal income tax withholdings) less only the decedent's "personal expenses" and that such earnings should be projected for his life expectancy rather than his work expectancy and after his dependent children attained their majority.

Reasons Relied on for Allowance of the Writ.

1. The Supreme Court of Illinois, in holding that the Supremacy Clause invalidates state legislation limiting the jurisdiction of state court when applied to FELA legislation, has decided a federal question of substance in a way probably not in accord with

a. The history, language and construction of the Supremacy Clause;

b. The decision of this Court in *Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1;

c. The intent of Congress as evidence by the provisions of the Federal Employer's Liability Act and §1404(a) of the Judicial Code, and as construed by this Court in *Douglas* v. *New York N. H. & H. R. Co.,* 279 U.S. 377; *Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1; and *Ex parte Collett,* 337 U.S. 55.

2. The Supreme Court of Illinois, in holding that there was no reversible error in the actuary's calculations of the present value of future contributions has decided a federal question of substance in a way in conflict with applicable decisions of this Court and of the Courts of Appeal for the Sixth, Seventh and Eighth Circuits in holding that as a matter of law, such calculations must be based on:

a. Gross earnings, less only decedent's "personal expenses" in conflict with *Kansas City So. Ry. Co.* v. *Leslie,* 238 U.S. 599;

b. Gross earnings before federal income tax withholding rather than "take-home pay" in conflict with *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302.

c. Decedent's life expectancy rather than work expectancy, in conflict with *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302;

d. Contributions to his minor dependents during his entire lifetime rather than during their minority, in conflict with *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625 and *Thompson* v. *Camp* (C.C.A. 6), 163 F. 2d 396 and *Chicago B. & Q. R. Co.* v. *Kelley,* (C.C.A. 8), 74 F. 2d 80.

ARGUMENT.

I.

THE SUPREMACY CLAUSE OF THE FEDERAL CONSTITUTION DOES NOT INVALIDATE THE ILLINOIS STATUTE LIMITING THE JURISDICTION OF ITS COURTS.

Since 1903, the Illinois wrongful death statute (inappropriately called the "Injuries Act") has provided:

> "No action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action exists under the laws of the place where such death occurred and service of process may be had upon the defendant in such place."

From the first, the Illinois courts applied the statute impartially, without discrimination as to the citizenship of the parties or as to the source of the right of action in a federal or state statute. In *Walton* v. *Pryor,* 276 Ill. 563, the Illinois court held the statute barred all action by an Illinois administratrix under the Federal Employer's Liability Act for the death of her husband at St. Louis, Missouri. The Waltons were residents and citizens of Illinois. In *Wall* v. *Chesapeake & O. Ry. Co.,* 290 Ill. 227 and *Dougherty* v. *America McKenna Co.,* 255 Ill. 369, the statute was applied to Illinois citizens suing under the wrongful death statutes of other states.

Following these decisions, Illinois courts have declined jurisdiction of out-of-state death actions. In *Stephenson* v. *Grand Trunk W. Ry. Co.* (C.C.A. 7), 110 F. 2d 401, the Court of Appeals held the statute did not restrict the jurisdiction of federal courts sitting in Illinois. This

Court granted certiorari limited to this issue, 310 U.S. 623, but the case was settled before hearing and dismissed pursuant to stipulation. 311 N.E. 720. See also *Davidson* v. *Gardner* (C.A. 7), 172 F. 2d 188. Subsequently, in *Hughes* v. *Fetter,* 341 U.S. 609, this Court, four justices dissenting, held unconstitutional as in conflict with the full-faith-and-credit clause (Article IV, Section 1) a Wisconsin statute generally like the Illinois statute and in *First National Bank of Chicago* v. *United Airlines, Inc.,* 342 U.S. 396 in an action brought in the Federal District Court in Chicago under the Utah wrongful death statute for the death of an airline passenger in a crash in Utah, this Court held that as applied to those facts, the Illinois statute also violated the full-faith-and-credit clause. Two justices dissented and two concurred specially, confining their concurrence to cases in the Federal District Courts.

The majority of the court below held that this "interplay of judicial decisions" limits the effective application of the Illinois statute only to "cases arising under the laws of the United States" and hence, under *McKnett* v. *St. Louis & S. F. Ry. Co.,* 292 U.S. 230 the Supremacy Clause of the Federal constitution overrides the legislative determination of the policy of the state to close its courts to out-of-state FELA death actions. Mr. Justice Klingbiel, dissenting, pointed out that there was neither a voluntary discrimination by Illinois against out-of-state FELA litigation nor any congressionable declaration of policy to the contrary.

We submit that the majority opinion below is squarely in conflict with this Court's decision in *Missouri ex. rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1. In that case it appeared that the Supreme Court of Missouri had construed *Baltimore & O. R. Co.* v. *Kepner,* 314 U.S. 44 and

Miles v. *Illinois Central R. Co.*, 315 U.S. 698 as compelling a state to reject the doctrine of *forum non conveniens* in FELA actions. 359 Mo. 827, 224 S.W. 2d 105. Deeming the question "important to the enforcement of the Federal Employer's Liability Act by the courts of the States" this Court granted certiorari, 339 U.S. 918, and upon review held that neither the *Kepner* nor the *Miles* cases

> "limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employer's Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially."

Turning to the legislative history, this Court pointed out:

> "There was nothing in that Act even prior to §1404 (a) of the 1948 revision of the Judicial Code, Title 28, U.S.C., which purported 'to force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse.' *Douglas* v. *New Haven R. Co., supra,* [279 N.S. 377] at 388."

Following the *Mayfield* case, state courts across the nation, with a growing awareness of the evils which follow the transportation and concentration of these cases in a few states, have held that under the doctrine of *forum non conveniens* the courts of those states are not required to entertain out-of-state FELA litigation. See *Price* v. *Atchison, T. & S. F. Ry. Co.*, 42 Cal. 2d 577, 268 P. 2d 457, overruling *Leet* v. *Union Pacific R. Co.*, 25 Cal. 2d 605, 155 P. 2d 42 and *Schultz* v. *Union Pacific R. Co.*, 118 Cal. App. 169, 257 P. 2d 1003; *Johnson* v. *Chicago, B. & Q. R. Co.*, 243 Minn., 58, 66 N.W. 2d 763, overruling earlier Minnesota decisions; *St. Louis-San Francisco Ry. Co.* v. *Superior Court* (Okla.) 276 P. 2d 773, followed in a subsequent case of the same name reported in 290 P. 2d 118; *Smith* v. *Atlantic Coast Line R. Co.*, 218 S.C. 481, 62 S.E.

2d 311. In *Atlantic Coast Line. R Co.* v. *Pope*, 92 S. E. 2d 300, the Georgia Court said:

> "The reversal by the Supreme Court of the United States of the *Pope case,* [345 U.S. 379] *supra,* is not construed here to constitute any restriction on the part of a sovereign state to determine its own policy. This court recognizes, as the Supreme Court of the United States must, that while Congress may pass an act establishing rights of action and conferring on State courts jurisdiction to hear and determine resultant litigation, Congress has no power to require State courts to accept jurisdiction of such causes of action."

If, as these decisions point out, and as this Court held in the *Mayfield* case, state courts are free "to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law," so the legislatures of the several states are free to adopt a statutory declaration of a limited *forum non conveniens* principle as a matter of local policy. This Court pointed out in *Building Service Union* v. *Gazzam,* 339 U.S. 532 at 537:

> "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the State.' *Twin City Pipe Line Company* v. *Harding Glass Company,* 283 U.S. 353, 357."

So, too, in Illinois, the public policy of the state is determined primarily by the legislature. *People ex rel. Healy* v. *Shedd,* 241 Ill. 155, 163; *Harding* v. *American Glucose Co.,* 182 Ill. 551, 616; *Illinois Bankers' Life Ass'n.* v. *Collins,* 341 Ill. 548, 551. The Supremacy Clause is binding upon "the judges in every state" as well as on state legislatures, and if a state in the exercise of its judicial power through its courts formulates a policy of excluding out-of-state litigation, whether FELA or otherwise, so

in the exercise of its legislative function in determining the jurisdiction of its courts, the state may accomplish the same result.

True the Illinois statute here involved is not a codification of the *forum non conveniens* principle. Neither is § 1404(a) of the Judicial Code, as this Court pointed out in *Norwood* v. *Kirkpatrick,* 349 U.S. 29, yet that statute declares the congressional policy as to FELA actions. *Ex parte Collett,* 337 U.S. 55. For the several discretionary standards of the *forum non conveniens* rule, the Illinois legislature substituted a single standard, the boundaries of the state, and it made that standard applicable, so far as it was able, to citizens and non-citizens, and to state, federal and foreign causes of action; dismissal, not transfer, resulted from lack of jurisdiction, not from lack of venue, but this choice was a proper legislative function.

We submit that nothing in the history, the language or the construction of the Supremacy Clause denies the right of Illinois thus to fix the jurisdiction of its courts where, as here, neither the Equal Privileges or Full Faith and Credit Clauses are involved. Historically the Constitutional Convention adopted the Supremacy Clause from the New Jersey Plan after decisively rejecting, both in committee of the whole and in convention, the provision of the Virginia Plan which would have empowered the national legislature "to negative all laws passed by the several States". Farrand, Records of the Federal Convention of 1787, Vol. I, p. 163; Vol. II, p. 28, p. 382. Bancroft says in his History of the Formation of the Constitution, Vol. II, pp. 90-91:

> "From the New Jersey plan it was taken without one dissentient, that the laws and treaties of the United States should be the supreme law of the states, and bind their judiciaries, anything in their laws to the contrary notwithstanding. *That all power not*

granted to the general government remained with the states was the opinion of every member of the convention; but they held it a work of supererogation to place in the constitution an express recognition of the reservation.'' (Emphasis added)

Curtis summarizes the post-convention development in his Constitutional History of the United States, Vol. II, p. 163:

"That the people of the several states would retain all the original and inherent powers not parted with by cession to the Federal Government was assumed to be a fundamental implication, resulting from the fact that the powers granted to the Federal Government were specific, described, limited, and enumerated, and did not comprehend all the powers of sovereignty. But when the Constitution, as originally framed and promulgated, came before the people of the several states for adoption and ratification, they were not content to leave this very important matter to implication; they demanded an express reservation of all the powers which were not to be ceded by the people of the several states to the Federal Governmenet, or which they were not to be prohibited from exercising. Accordingly the Tenth Amendment, adopted in 1789-91, was made to declare:

" 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

"By this reservation every state remains a self-governing political community, in respect to its own inhabitants, in every relation in which those inhabitants are not by the Constitution of the United States placed under the authority of the Federal Government.

"It is this mass of rights, privileges, and powers not vested in the Federal Government, but retained by the people of each state, that constitutes the state sovereignty. It follows, as a necessary consequence from this system, that the people of every state in this Union have under their entire control every relation

> of their inhabitants that is not under the control of the United States by reason of some provision in the Federal Constitution. With the domestic relations of their inhabitants the states can deal as they see fit."

Thus the Tenth Amendment reserves to the several states the power to determine the jurisdiction of their courts.

Nothing in the language of the Supremacy Clause sustains the ruling of the Court below. The Supremacy Clause provides merely that "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Here "the law . . . made in pursuance" of the Constitution is the Federal Employer's Liability Act. But as this Court pointed out in the *Mayfield* case, while section 6 of the Act empowers the courts of the several states to entertain suits arising under it:

> "There was nothing in that Act even prior to § 1404(a) of the 1948 revision of the Judicial Code, Title 28, U.S.C., which purported 'to force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse'. *Douglas* v. *New Haven R. Co., supra,* at 388."

Even in *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230, upon which the majority opinion below is based, the Court said:

> "Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employer's Liability Act."

In *United Automobile Workers* v. *Wisconsin Employment Relations Board,* decided June 14, 1956, this court said:

> "If the congressional enactment occupies the field, its control by the Supremacy Clause supersedes or, in the current phrase, pre-empts state power."

Here Congress has not occupied the field (compare *Pennsylvania* v. *Nelson*, 76 S. Ct. 477 and *Railway Employees' Dept.* v. *Hanson*, 76 S. Ct. 714); on the contrary, to the extent that congressional intent can be derived from "the plain meaning of the statutory words and the consistent course of the legislative history" of section 1404(a) of the Judicial Code, freeing federal district courts from the mandatory venue provisions of section 6 (see *Ex parte Collett*, 337 U.S. 55), it is that a court in which an FELA action *may* be brought is not *compelled* to entertain it. Mr. Justice Jackson, concurring in the *Mayfield* case, pointed this out:

> "Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case."

This Court's construction of the Supremacy Clause as affecting the jurisdiction of state courts over federally-created rights is set forth in the concurring opinion of Mr. Justice Frankfurter in *Brown* v. *Gerdes*, 321 U.S. 178, at 189:

> " * * * Whether a state court is 'competent to decide rights of the like character and class,' whether the particular litigation is to be tried by jury and, if so, how the jury is to be composed whether it is to be a jury of twelve or less, whether decision is to be by unanimity or majority, whether security is to be furnished and of what nature — in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be — all these are matters wholly within the control of the State creating the court and without the power of Congress. See, for instance, *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U.S. 211. As it was put by Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat.

304, 330-331, 'Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.' Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that the State has decreed for every other litigant who seeks access to its courts.

"4. Congress from the beginning has allowed federally created rights to be enforced in state courts not only by the general implications of our legal system but also by explicit authorization. The nature of the obligation of the state court under such legislation has been most litigated in connection with the Federal Employer's Liability Act, and after thorough canvass the matter was thus summarized by Mr. Justice Holmes in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, 387-388, 'As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.'

"5. The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court. It certainly has not done so by the Bankruptcy Act nor can any implication to that effect be derived from the Supremacy Clause of the Constitution. For the Supremacy Clause does not give greater supremacy to the Bankruptcy Act over the free scope of the States to determine what shall be litigated in their

courts and under what conditions, than it gives with reference to rights directly secured by the Constitution, such as those guaranteed by the Full Faith and Credit Clause, see *Anglo-American Provision Co.* v. *Davis Provision Co., No.* 1, *supra,* or with reference to the power exercised by Congress under the Commerce Clause, see *Minneapolis & St. Louis R. Co.* v. *Bombolis, supra.*"

Mondou v. *New York, N. H. & H. R. Co.,* 223 U.S. 1, is an illustration of the principle that when Congress gave state courts concurrent jurisdiction of FELA actions, it took the state courts as it found them. In that case this Court held that an FELA action might be maintained "as of right, in the courts of the state where their jurisdiction, *as prescribed by local laws,* is adequate to the occasion." 223 U.S. 1, at 55 (emphasis supplied). In its first opinion the Illinois court relied heavily upon the *Mondou* case, but in the final opinion on rehearing, the premise that Illinois courts were experienced in the trial of wrongful death and FELA actions is abandoned *in toto;* instead the court recognized frankly that "if not in conflict with the United States constitution, it [the Illinois statute] bars the present action;" hence the trial court's jurisdiction, "as prescribed by local laws" was *not* adequate to the occasion. The sole ground of constitutional conflict was with Article VI, the Supremacy Clause. The Illinois court found such conflict as the result of the "interplay of judicial decisions" applying the Full Faith and Credit clause, because of which the statute "has been limited to apply only to suits arising under the laws of the United States or of a foreign country." But as Mr. Justice Klingbiel points out in his dissenting opinion, the State of Illinois has not discriminated against federal causes of action; the policy of Illinois is declared by its legislature and applied by its courts for 48 years "makes no distinction on the basis of

the law sought to be enforced. . . . The practical difference of treatment arose from the decision of the United States court in *Hughes* v. *Fetter* [341 U.S. 609], not from action or choice by this State." It is the interplay of different constitutional provisions which brings about the difference in result; that difference in result created by the constitution itself cannot be an unconstitutional discrimination.

We submit that the legislatively-declared policy of Illinois as limited by *Hughes* v. *Fetter* is entitled to the same recognition as the judicially declared policy of *forum non conveniens* in other states. The factors which impelled the Court to grant certiorari and to reverse the judgments below in the *Mayfield* case are equally impelling here.

II.

THE RULINGS OF THE TRIAL COURT AND THE DECISION OF THE SUPREME COURT AS TO THE COMPETENCY OF THE ACTUARIAL EVIDENCE ARE IN CONFLICT WITH CONTROLLING FEDERAL DECISIONS.

The second question presented by this case, of importance in the enforcement of the federal statute, is the admissibility and competency of actuarial calculations based upon the decedent's gross earnings for the full period of his life expectancy as shown by annuity tables. Upon these issues the final decision below is directly in conflict with this Court's decisions in *Kansas City So. Ry. Co.* v. *Leslie,* 238 U.S. 599, and *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625, and the decisions of the Courts of Appeal for the Sixth, Seventh and Eighth Circuits in *Thompson* v. *Camp* (C.C.A. 6), 163 F. 2d 396; *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302; and *Chicago, B. & Q. R. Co.* v. *Kelley* (C.C.A. 8), 74 F. 2d 80.

Over the defendant's detailed and specific objections and motion to strike (which appear at pages 107-109 and 115-116 of the printed abstract of record below and are partially summarized in the final opinion below, set forth at App. p. 11) the trial court permitted an actuarial witness to testify that the present cash value, discounted at 2½% and 3% of monthly contributions of $378.09 for 464 months was, respectively, $112,904.37 and $104,418.69. (Abst. 106-108) The figure of $378.09 per month was based upon Allendorf's gross earnings for 1951, the year preceding his death, less only (1) the amount of his 1951 federal income taxes and (2) $50 per month, which amount his widow testified he used "for his personal purposes." (Abst. 94; opinion, App. p. 14) and the figure of 464 months was an assumed "work expectancy" to age 65. (Abst. 108) The witness also testified to similar calculations based on a projection of Allendorf's 1952 earnings, the figures being $115,006.64 and $106,362.89. (Abst. 109)

Upon rehearing the Supreme Court of Illinois held the actuarial evidence was improper, saying:

> "It is agreed that it was not within the province of the actuary to testify that the plaintiffs have been deprived of a monthly contribution of $378.09, nor was it within her province to say how long any contribution might continue. If the witness had been asked to quote the value of $1 per month payable at the end of each month for periods of ten, twenty, thirty, forty years, then the jury with the assistance of counsel could project that figure into the future, for however long a period the jury should determine. The salient vice of the challenged testimony is implicit in the likelihood that the jury interpreted the actuary's presentation as testimony that decedent would continue to work as a switchman for 38 years and 8 months and that his earnings would remain at $5500 per year and

that his dependents would receive from him $378.09 per month for that period."

* * * * * *

"To allow an actuary to testify to figures, which the jury might adopt as real, carries with it the danger that the jury will accept them not only as the actuary's explanation of his process of computation, but also as proof of contribution and life and work expectancy. Anticipating this very danger, the defendant caused the jury to be instructed that the actuary's testimony was not to be so interpreted and on cross-examination of Miss Young, it was thoroughly developed that she did not mean to be saying what amount in dollars the plaintiffs would have received had decedent lived, nor for what period of time they would have received the same."

and held that:

"We are of the opinion that the proper method of assisting a jury in making damage calculations is for the actuary to use neutral figures. In the usual situation where hypothetical inquiries are permissible, it is necessary that the expert assume a factual situation as reflected in the proof in order to insure that his testimony bears upon the issue to be determined. The actuary, however, is called upon only to describe to the jury a mathematical process that will simplify the jury's task of determining the present value of the contribution that plaintiffs would have received had decedent not been killed. To accomplish that purpose it is not necessary that he use figures that correspond with those appearing in evidence, and when he does so there is a danger that the jury may be misled. Once the formula is before the jury, its application to the facts of the case is a matter for argument of counsel."

But instead of reversing the judgment because "the jury was undoubtedly misled by the actuary's figures" as was done in the controlling decision, *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302 at 311, the court

below held that the error was "counterbalanced by the many other advantages" to the defendant in that the calculations were based on net earnings, after deduction of $50 per month for "personal expenses" and federal income tax withholdings and upon an assumed "normal age for railroad retirement" of 65. (Opinion, App. p. 17) Thus the Illinois court squarely held that as a matter of law the pecuniary loss to a widow and minor dependents must be based on the decedent's gross earnings, less only his purely personal expenditures, extending over his entire life expectancy. We submit that each of the "counterbalancing advantages" thus found were erroneous as a matter of law.

Plaintiff's counsel conceded, in their briefs below, that it had been "settled law for 40 years" that "in a death case under the FELA the measure of damages is the pecuniary loss to the dependents," citing *Michigan Central R. Co.* v. *Vreeland,* 227 U.S. 59, and *Kansas City So. Ry. Co.* v. *Leslie,* 238 U.S. 599. But in holding that only the decedent's "personal expenses" need be deducted from his gross earnings, the Illinois court is directly in conflict with the admittedly "settled law" of the *Leslie* case, where this Court held that it was reversible error to instruct the jury that from their estimate of the decedent's future earnings "the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover" 238 U.S. at 604. The error is not rendered harmless by the court's observation that "if $50 did not correctly reflect the amount of decedent's personal expenses, it was defendant's privilege to adduce proof to the contrary." (Opinion, App. p. 14); under the *Leslie* case, the measure of damages was *not* "gross-earnings-less-personal-expenses" and the burden was on the plaintiff

to adduce competent evidence of pecuniary contributions, and not upon the defendant to prove her damages in this respect. Defendant's objection to the testimony as to "personal expenses" (Abst. 93) was well taken; on cross examination it was shown without contradiction that a part of his wages went monthly into a credit union account, into the purchase of a house and a car, as well as insurance premiums, in addition to food, clothing and shelter for himself. (Abst. 94-95) More was not needed to show the fallacy of the use of the "personal expense" figure of $50 a month, and the trial judge had already ruled he would not permit more. (Abst. 94)

The approval by the Illinois court of the use of gross earnings, rather than "take home pay" *i.e.* after federal income tax deductions, as the base figure, and life expectancy rather than work expectancy as the period involved is also contrary to the carefully considered and frequently approved decision of the Court of Appeals for the Seventh Circuit in *Wetherbee* v. *Elgin, J. & E. Ry. Co.* (C.A. 7), 191 F. 2d 302. In that case the actuarial witness testified "as to the cash value at the time of trial of decedent's probable future gross earnings" without taking into consideration "the possibilities of Wetherbee's disability from illness or accident, or the matter of voluntary retirement" and his computations "were not based on the amount of decedent's take home pay." 191 F. 2d 310. The actuarial witness here made the same admissions upon cross examination by counsel who had tried the *Wetherbee* case. (Abst. 110-112) The Court of Appeals summarized the objections made in the *Wetherbee* case: that the testimony was "based upon two false and incompetent premises: (1) that decedent's probable future earnings may be calculated on the basis of life expectancy instead of the length of time he may expect

to be employed; (2) that his dependents' loss of future benefits may be calculated on decedent's probable future gross earnings rather than on his probable contributions for their support." 191 F. 2d 310-311. The court below summarized our objections here (Opinion, App. p. 11):

> "It is contended here that since the jury's verdict so closely approximated the projected result reached by the actuary, that the jury of necessity relied upon the two factors, namely, $378 per month and 38 years and 8 months, as established by the evidence; that by so doing the jury failed to take into consideration many uncertainties in life, namely, that decedent might not have lived 38 years, nor continued to be employed for that period, nor received the same pay throughout, that payments to his dependents would not remain the same after his children became of age, that his personal expenses might exceed $50 per month, etc."

In the *Wetherbee* case the Court of Appeals sustained both of defendant's contentions; here the Illinois Supreme Court holds that gross earnings irrespective of tax withholdings and life expectancy rather than work expectancy are the proper bases of calculation by the jury.

The conflict between the decisions which, on the one hand, must be followed in federal courts sitting in Chicago and those which govern state courts in Illinois is clear and direct. The *Wetherbee* decision is not to be explained by the specious argument that the only question decided was that the jury had failed to diminish damages in proportion to the decedent's negligence and "for that reason alone reversed." The records of this Court demonstrate that counsel in that case, who could best appreciate the issues decided there, made no mention of such a basis for decision in their briefs either on certiorari or rehearing. Common sense supports the rule in the *Wetherbee* case. Federal income tax withholdings—money earned but never

received by a wage earner—is no part of the pecuniary contributions to his dependents; it is his pecuniary contribution to his government. It is the use of gross earnings, a large part of which a man never sees and never spends, and the attempted projection of those earnings for thirty or forty years into the future, and not "the incident of taxation" which "introduces an extraneous subject, giving rise to conjecture and speculation." Present day wage rates, fixed by nation-wide collective bargaining, naturally include present federal income taxes; taxes are as much a part of wage increases as are cost-of-living indexes.

The fallacy of projecting gross earnings over the employee's entire life expectancy rather than his work expectancy is exposed by the *Wetherbee* decision. Again common sense compels the conclusion that a workman cannot continue to make "pecuniary contributions" to his dependents when he is no longer working. Juries may be kept uninformed of Railroad Retirement Act benefits (see *Chicago & N. W. Ry. Co.* v. *Curl* (C.A. 8), 178 F. 2d 497, 502) but courts cannot fail to take judicial notice of the beneficial retirement provisions of that statute and the common knowledge that the vast majority of railroad men reaching retirement age avail themselves of those benefits.

A second fallacy in the assumption that Allendorf's contributions to his dependents would continue in the same proportion of his income for his entire life expectancy is that this assumes he would continue to support his children during his entire expectancy of 67 or 68 years (Abst. 97), when the children would be in their early forties. (Abst. 92) This assumption and the conclusion of the Illinois court based upon it is contrary to the long-settled

rule first announced by this Court in *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625, and followed in *Thompson* v. *Camp* (C.C.A. 6), 163 F. 2d 396, and *Chicago, B. & Q. R. Co.* v. *Kelley* (C.C.A. 8), 74 F. 2d 80, that the recoverable damages of minor dependents are limited to the period of their minority. Again we all know as a matter of common experience that adult children, unless they are mentally or physically defective, are not supported by their parents, and an actuarial witness should not be permitted to mislead the jury by calculations based on assumptions which are contrary to fact.

We submit that none of the factors which the court below thought "counterbalanced" what the court found was "the salient vice" of the actuary's use of assumed actual figures of earnings and expectancy is sound as a matter of law. That evidence put before the jury what appeared to be the testimony of an expert that Allendorf's dependents had sustained a pecuniary loss well over $100,000. The error in permitting the jury to be thus misled was not cured by any of the factors relied upon by the court below. The conflict between long-settled decisions of this and other federal courts and the attempted justification for failure to reverse for admitted error set forth in the opinion below upon the proper elements of recoverable damage in an FELA death case presents an important question in the administration of the act which should be clarified by this Court.

CONCLUSION.

We respectfully submit that the considerations which led this Court to grant certiorari in the *Mayfield* case are equally present here. If, despite the fact that Congress has never attempted to compel state courts to hear all FELA cases, no matter where the cause of action arose

and irrespective of the considerations which by §1404(a) of the Judicial Code Congress made applicable to FELA actions in federal courts and despite the further fact that this Court directly held in the *Mayfield* case that state courts might as a matter of local policy apply the doctrine of *forum non conveniens* to FELA actions, a state is without the right to determine the jurisdiction of its courts by a non-discriminatory statute when applied to out-of-state FELA causes of action, there has been a serious invasion of the rights reserved to the states under the Tenth Amendment. The construction which the Illinois court places on the Supremacy Clause would equally forbid state courts from applying the doctrine of *forum non conveniens* to FELA cases; as a practical matter, those cases are virtually the only ones in which that doctrine is invoked. The right of a state to free its courts of the burden of litigation with which it has no concern whatever is of vital importance in the administration of this statute, and that right, repeatedly declared by this Court and never attempted to be impaired by Congress, is the basic issue here.

From a practical standpoint, the proper limits on actuarial calculations of recoverable damages in an FELA death case is an important factor in the administration of the statute. The conflict between this and other recent decisions of the Illinois court and the decisions of federal courts is increasing rather than lessening; that conflict can only be resolved by this Court.

For these reasons, your petitioner respectfully prays for the issuance of the writ of certiorari to review and resolve the serious conflicts presented by the decision below.

Respectfully submitted,

HARLAN L. HACKBERT
Attorney for petitioner.